Haynes-Trane Service Agency, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208. Case 27-CA-6503

October 28, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 17, 1980, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] At fn. 10 of his Decision, the Administrative Law Judge stated that, according to its president, Fred Haynes, Respondent never sent employee Charles W. Ledford a warning letter regarding alleged threats to management because Ledford's suspension had been deemed warning enough. The record shows that Ledford was suspended solely because he refused to report to a temporary job assignment in Denver. Haynes' testimony that Ledford's suspension was considered warning enough was in the context that no useful purpose would have been served by disciplining Ledford for a second act of alleged misconduct at a time when he was being subjected to more severe discipline for an earlier act. Haynes did not suggest that Ledford's alleged threats motivated his suspension in any way.

[2] The General Counsel has excepted, *inter alia*, to the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(4) and (1) of the Act by discharging employee Ledford. In support of this exception, the General Counsel points to certain testimony the Administrative Law Judge did not discuss which appears to establish some link between a threat Ledford made to file charges with the Board and his dismissal.

Service Manager Jan Aldrich testified on cross-examination that a letter was drafted, but never sent, which would have warned Ledford that continued threats to management personnel would result in his discharge. The letter reads as follows:

> Dear Mr. Ledford:
>
> On——occasions in the recent weeks you have made various threats to other management personnel in this company, apparently in connection with the charges you have filed with the NLRB. On October 23, in a phone conversation with Bill Watkins regarding your failure to accept a temporary assignment to Denver, you threatened that "Someone's head is going to be broken."
>
> The company cannot ignore or tolerate such threats. This letter should be considered by you as a serious reprimand of your conduct, and because you are already on a week's suspension without pay, no further action will be taken. However, any recurrence of threats, abusive, or insubordinate conduct will result in your immediate discharge.

Aldrich further testified that included among the threats contemplated by the letter were threats of civil action and bodily harm and a threat Ledford had made concerning the filing of charges with the Board. The General Counsel argues that, because one of the four reasons for discharge listed on Ledford's memorandum of dismissal was "Insubordination in the form of both passive and active threats to management, and a challenge by yourself for management to discharge you," Respondent must have terminated Ledford for attempting to exercise his rights under the Act as it stated it would do in its earlier letters.

Aldrich's testimony does in fact raise the possibility that, in drafting Ledford's dismissal memo, Respondent may have taken into account Ledford's threat to file NLRB charges as well as other unprotected threats. However, careful examination of the circumstances surrounding Ledford's dismissal establishes that Ledford's threat to file NLRB charges did not play a motivating role in his discharge.

On the morning of October 22, 1979, Ledford refused to report to a temporary job assisgnment in Denver. Later that day, he was notified by wire that he would be suspended for 1 week if he did not report to the Denver job the following day. On October 23, Ledford again refused to report. As a result, he was suspended from October 24 through October 31. Ledford returned to work on November 1, and was again ordered to report to a Denver job. Respondent accepted his excuse that he could not go to Denver that day for personal reasons. However, when Ledford again declined to go to Denver the next day, he was discharged. This sequence of events persuades us that Ledford's termination was precipitated by his repeated refusal to accept temporary work assignments in Denver. Thus, under the test adopted in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. *N.L.R.B.* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), we are compelled to conclude that the General Counsel has not made "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor'" in Respondent's decision to discharge Ledford.

Because the General Counsel has failed to make a *prima facie* case, in which event the issues treated in *Wright Line* do not arise, Member Jenkins does not consider *Wright Line* pertinent.

Member Zimmerman agrees that Respondent did not violate Sec. 8(a)(4) and (1) of the Act. He finds that, through the testimony of Service Manager Jan Aldrich, the General Counsel made a *prima facie* showing that protected conduct was a motivating factor in Respondent's decision to discharge employee Ledford. The mention of the filing of NLRB charges in a proposed letter of discipline 1 week prior to the discharge, coupled with the repetition of the same language regarding "threats" in the actual dismissal letter, supports the inference that protected conduct was a motivating factor for the discharge. However, he further finds that Respondent established that it would have discharged Ledford for repeated refusals to accept temporary work assignments even in the absence of his protected conduct.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me in Denver, Colorado, on August 12-14, 1980, pursuant to a complaint issued by the Regional Director for Region 27 for the National Labor Relations Board on February 19, 1980, and which is based on a charge filed by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208 (herein called the Union), on January 8, 1980. The complaint alleges that Haynes-Trane Service Agency, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act, as amended (herein called the Act).

Issues

The principal issue is whether Respondent discriminatorily ordered its employee Charles W. "Bill" Ledford to transfer from its Colorado Springs office to its Denver headquarters as a reprisal for its employees' having chosen representation by the Union. When Ledford refused to transfer, he was suspended; he refused a second time and was thereafter discharged. Thus, a sequential issue is whether or not those acts were likewise unlawful. In an alternative theory the General Counsel has alleged that Respondent took its action against Ledford because he participated in a representation case hearing. Finally, as a third alternative, there is the allegation that the decision to transfer Ledford was a unilateral change in working conditions and designed to undermine the Union's majority status.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent admits it is a Colorado corporation engaged in the sale, installation, and service of heating and air oonditioning equipment having its headquarters in Englewood, Colorado, and a subsidiary office in Colorado Springs. It further admits that during the past year, in the course and conduct of its business, it has purchased and received goods and materials valued in excess of $100,000 from suppliers outside Colorado. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Participants*

Respondent is a heating and air-conditioning sales and service business which holds an exclusive Trane Company franchise for the State of Colorado and parts of Wyoming and Nebraska. As noted its headquarters are in Englewood (a suburb on the south side of Denver)[1] and it has a subsidiary office in Colorado Springs. In addition it has another subsidiary office in Cheyenne, Wyoming. The business is divided into two sections, the sale of new Trane Company equipment and the service of heating and air-conditioning equipment manufactured not only by Trane but by others. This case involves the service end of Respondent's business.

Respondent's entire operation is run by its president, Fred Haynes. His assistants with respect to the service agency are Controller William Watkins and Service Manager Jan Aldrich. Under Aldrich are field supervisors and so-called "service engineers," i.e., those individuals actually engaged in installation and/or repair of equipment.

The Colorado Springs office was also divided into the two divisions but was much smaller. During the period in question it had two or three sales persons, including a sales manager, two service engineers, including the alleged discriminatee, Bill Ledford, and two office workers who provided clerical support to both sides of the business. Until August 1979,[2] Ledford was in charge of the Colorado Springs service operation. For some period prior to the transactions to be described herein, he reported directly to Aldrich. However, the Denver operation also had an intermediate field supervisor who had direct supervision of the service engineers and who reported directly to Aldrich. Ledford did not report to him until August. At that time the field supervisor was Greg Koenig.[3]

B. *The Union Organizing Drive and the Election*

On April 25 Respondent issued a new policies and procedures statement with respect to the employer-employee relationship. On April 27 a group of employees, including Ledford, met with Fred Haynes to discuss the new policies. Dissatisfied with the changes and with management's responses the employees met at a nearby restaurant and discussed the possibility of seeking union representation. Ledford's participation in both meetings was not remarkable as compared to any other employee's. He later signed a union authorization card, but so did most of the other employees. A petition was filed by the Union and on June 12 a hearing was conducted in Denver with respect to it. One of the issues was the question of whether or not Ledford, as the head of the Colorado Springs service operation, was a supervisor within the meaning of Section 2(11) of the Act and whether he was properly includable in the voting unit. Through counsel Respondent sought a continuance of that hearing because it conflicted with a previously scheduled trade show in which Respondent was a participant, but the hearing officer denied the motion. Respondent thereupon did not participate further in the hearing.

Ledford, aware that his status was an issue, had left work that day to attend the hearing. He testified with respect to his duties at Colorado Springs and subsequently the Regional Director issued a Decision and Direction of Election which, among other things, found him not to be a supervisor. A mail election was arranged and the ballots sent to all eligible voters on July 27. On August 10 the returned ballots were opened and counted. The election result showed that the Union had obtained a major-

[1] The parties refer to the Englewood headquarters as the "Denver" office. That terminology will be followed herein.

[2] Unless otherwise indicated all dates are in 1979.

[3] The Cheyenne operation, which is not really pertinent here, was run by one individual who handled both service and sales.

ity and the Regional Director 10 days later certified the Union as the exclusive bargaining representative of the service engineers unit, covering the Denver, Colorado Springs, and Cheyenne offices.

C. *Ledford's Employment at Colorado Springs*

Ledford was originally hired by Respondent in 1979 and worked in the Denver office as a service engineer until 1976 when he was transferred to Colorado Springs. From 1976 to 1978 he was the only service engineer in Colorado Springs and was supervised by the manager of that operation, Dick Logue. In mid-1978 Respondent hired Mike Edde who was trained momentarily in Denver and then assigned to Colorado Springs. Shortly thereafter Logue resigned and Ledford became the service manager.[4] He held that position until August 27, 1979, when the senior clerical in Colorado Springs, Lois Gysin, became service coordinator and Ledford began reporting directly to Greg Koenig.

Also on that day Jan Aldrich, the service manager, informed Ledford that he was to relocate in Denver by December 1, 3 months hence. The only reason Aldrich gave Ledford for the decision was "economic considerations." Ledford contends that Aldrich said nothing further, but there is reason to believe that Aldrich either told Ledford, or that it was a company policy well known to Ledford because of his 1976 transfer, that Respondent would assume most, if not all, the costs of his relocation. Ledford testified that the decision came as a "total suprise."

That evening Ledford decided to ask Respondent's officials to reconsider their decision. His family had become well situated[5] in Colorado Springs and he had no desire to leave that city. He says he first called President Haynes at his home and told him he did not wish to move back to Denver. He told Haynes that he felt the decision was "a union reprisal"; they also discussed other matters including his assertion that he and the Colorado Springs office had been "more or less kept in the dark as to what the profit pictures were." Haynes told Ledford that the decision stood and that it was an economic consideration. Ledford later called Aldrich and had a similar discussion with him, also to no avail. Ledford testified that in both conversations he asserted he had made an agreement with the Company in 1976 when he had moved to Colorado Springs that if he liked that city he could stay. He says another agreement was reached in 1978 when Edde was assigned to that office. The second agreement was to the effect that in the event it became necessary to rotate an individual back to Denver it would be Edde, not him. Ledford says both Haynes and Aldrich professed lack of knowledge of such agreements. Their testimony, as well as Watkins', is similar; they knew of no such agreements.[6] On this record there is no evidence, other than Ledford's testimony, that either agreement existed.

On cross-examination Ledford explained the basis of his accusation to Haynes that the transfer was "a union reprisal." He said that the events which led him to that conclusion involved "times when we were ostracized by the Company." On further examination he said the Company's treatment of him was "an ignoring [sic] . . . very little was said to us."

On August 14, 4 days after the ballots were counted, Aldrich went to Colorado Springs. He met with Ledford at a local pancake house and a conversation covering a number of topics occurred. According to Ledford, Aldrich principally "discussed the union." Ledford says Aldrich told him "the guys had brought he [sic] and Fred [Haynes] to their knees with the Union, with voting in the Union." Ledford recalled Aldrich also said, "[Haynes] wouldn't have to sign an agreement. He just had to negotiate." In the same conversation, according to Ledford, Aldrich also told him that "the union vote is behind us, and that seemed to take up a lot of everyone's time . . . and let's continue with the work now."

Aldrich agrees that on August 14 he met with Ledford in Colorado Springs. He had gone there to review some job files and had picked up six files to examine. He recalled the pancake house conversation somewhat differently and places different emphasis on it. He remembers that when he spoke to employees, including Ledford, during that period it was common for them to quickly bring up the Union as a topic. He said he and other supervisors had been instructed to avoid conversations of that nature but it was hard to do so because of the employees' persistence. He remembers the conversation in question as occurring in the following manner.

> The way I recall, Mr. Ledford alluded to the fact that now we are union, we are going to do this, this, and this. I said, as I understand it, let me explain the position: we are not union, we are committed to sit down and bargain in good faith to establish a contract; we may end up establishing the existing contract, we may forge a new contract; I don't know, but we're not union. We are committed to sit down and bargain in good faith.

With respect to Ledford's testimony that he had said something to the effect that the Union had brought Haynes and him "to their knees," Aldrich said, "I may have used that expression. I can't honestly say that I said it, but I may have."

Between August 27 and mid-October Ledford's employment continued in the normal fashion with one exception. At some point Ledford decided he would not transfer to Denver though he may have hoped Respondent would change its corporate mind about requiring him to do so. On September 27 he signed a trade name affidavit, actually filing it on October 2 with the County Clerk, establishing a trade name for a new heating and air-conditioning business, Service Engineering, of which he was to be the proprietor. In addition there is his testimony that he had obtained a $90 receipt dated September 28 from the telephone company as a deposit on a

[4] Another individual, Stacy Heib, became the sales manager at that time.

[5] Ledford's phrase was "dug in."

[6] Ledford at first testified Aldrich told him the question of such an agreement would be "settled in the courts." Almost immediately he backed off saying that such a remark may have occurred in another conversation with Controller Watkins much later.

business telephone. Also, he made an arrangement with the telephone company to buy a large Yellow Pages advertisement for Service Engineering. The dates of these activities are not quite clear but appear to have been in late September. On October 18 he established a business bank account for Service Engineering.

Ledford said that on October 18 he had heard from Lois Gysin, who was scheduling the Colorado Springs employees, that he was to work on a Denver area job beginning Monday, October 22. He also said Koenig told him officially of that assignment on October 19. (Gysin also said she first told Ledford of the assignment on October 19 and described that conversation in some detail.) Koenig says it was either on October 18 or 19 that he told Ledford he was scheduled for a Denver job involving 2 days' work. Koenig testified Ledford responded saying he would not go to the job and that he had received advice that a temporary job in Denver was the same as a transfer and, if he acquiesced, it would be used against him in some fashion. Koenig also reported that Ledford told him the transfer was not part of "the deal" and if anyone were to go to a Denver job it should be Edde. Koenig replied he was unaware of any "deal"; Koenig later testified such arrangements did not exist for anyone else.

On October 22 Ledford refused to go to the Denver jobsite. It should be noted here that Ledford had possession of a company truck and regularly used it to commute from his home to work as well as driving it to various worksites. He was expected to drive the truck to the Denver job. He claims Koenig had said he would not be entitled to travel pay while enroute between Colorado Springs and the Denver site. Koenig was not asked that particular question, but Haynes said it is company policy to pay employees their standard hourly rate while engaged in lengthy commutes. The April 25 policies and procedures memo permitted an employee a half hour commute time. Ledford deemed that to be insufficient. But that provision seems aimed at the Denver-based employees for Denver-area jobs. It appears unlikely to have had applioation to Ledford who was in the process of being transferred and who was being staged into Denver. Oddly, Ledford never asked Aldrich who could have clarified the matter of travel pay. Haynes testified Ledford would have been on full pay for travel time to Denver during the transfer period. In any event, allowing for the policy's half hour travel time, the amount of money involved herein is probably in the neighborhood of half an hour's pay each direction as Colorado Springs is only approximately 70 miles from Denver. Ultimately Ledford conceded that the question of travel pay was not the reason he refused to report to the Denver site; it was his refusal to work in Denver at all.

Ledford's refusal to go to the Denver job on October 22 was promptly reported to Denver by Gysin. Shortly thereafter Controller Watkins called her back to tell her he had not decided what action to take. Later that day Aldrich sent Ledford a wire (originally telephoned to him, but later put in writing by Western Union) which read as follows:

> This wire will serve notice that because of your failure to report to your assigned job today, you have put the Company's account relationship in jeopardy. You are hereby instructed to report to your assigned job tomorrow. Failure to comply with this directive will result in one week's suspension without pay commencing 10-23-79 and ending 10-31-79.

On October 23 Ledford again refused to go to the Denver site. When Gysin reported his refusal to Denver she was told he was to be suspended; that did not occur immediately as there was some confusion over the exact suspension period. On that day Ledford assigned himself to go with Edde to a Colorado Springs job. His suspension actually began the following day.

On Thursday, November 1, Ledford was to return to work. Again he had been assigned to work a Denver area job. That morning he called Gysin to tell her he would not be leaving his home for some time as the wing window of his truck had been broken. He was afraid someone had broken into it the previous evening, Halloween night, and he needed to determine if any equipment was missing. He told Gysin he was waiting for the police.[7] She reported the situation to Denver and although Watkins thought his reason for not reporting to the Denver site was "flimsy" he tolerated the situation. Edde went to Ledford's home to help him. Ledford did no work that day, although later he and other employees had a discussion at the office with Watkins who had come down on another matter.

On the next day, November 2, Ledford picked up the truck at the Ford dealership where it was being repaired. He testified that, when he attempted to drive it, the motor did not run correctly.[8] He told Gysin that the vehicle was inoperable and he wanted to leave it at the garage for repairs. Either she or someone from Denver told him to get to Denver any way he could, including using Edde's truck, but he refused. She testified that he tried to get her to overrule the Denver assignment, but she would not do so because there was nothing more pressing to do in Colorado Springs. She reported his refusal to Denver and was told that someone would be right down to take care of the matter.

Later that morning Watkins appeared at the Colorado Springs office and discharged Ledford by memo signed by Aldrich. The memo recites four reasons for his discharge. The first and fourth reasons are connected. The first recites that on two occasions he failed to report for temporary job assignments and the fourth says that he had placed a customer's account in jeopardy by working on jobs which are not assigned to him. The second reason given was "questionable reporting of time worked on job assignments" and the third was "insubordination" taking the form of both "passive and active threats to

[7] A police report was never filed. Ledford says that when he told the police nothing was missing they refused to investigate his complaint.

[8] The dealership later reported the truck needed new spark plug wires, but Watkins declined the repair and drove the truck to Denver. The spark plug wires were never replaced, at least within the period pertinent here.

management and a challenge by yourself for management to discharge you."

Items one and four encompass his October and November refusals to report to Denver assignments. These have been explicated above. Item two involved two things. The first was a time report for June 12, the day of the National Labor Relations Board's hearing in which Ledford had claimed to have worked a full 8-hour day. However he had been off the entire morning at the Board hearing and had not mentioned his absence to attend the Board hearing on his timecard. This resulted in Aldrich's questioning the timecard. Aldrich "officially" accepted Ledford's explanation that the time had been worked after the hearing had ended. In fact Aldrich continued to doubt Ledford but, not wishing to make an issue of it, let it drop.

The second, and more important, matter covered by item two involved an observation made by Gysin during Ledford's week on suspension. One of Gysin's duties was to perform the paperwork on each work order to collect data and material for proper billings to the customers. Although not particularly perceived by either her or Ledford at Colorado Springs, some of that same data was used by Denver, particularly the controller's office, to determine manpower efficiency. One of the calculations done for that purpose was to compare the number of billable hours per month with the number of hours actually billed. That was done for each job and Colorado Springs had been under some scrutiny since January because of a perceived managerial inefficiency in the service department. According to both Haynes and Watkins it was these figures, together with unfavorable profit projections, which led Haynes to decide to transfer Ledford to Denver in the first place. On August 14 Watkins had taken six files to examine for the purpose of identifying problem areas with respect to profit efficiency. During that time he had explained to Ledford, perhaps in nondetail form, what his concern was. In late October Gysin had occasion to go through similar files and had noticed that enclosures appeared to be stapled to the folders contrary to office practice and that some of the hours charged to the job were not consistent with the hours being submitted by the service engineer, principally Ledford. She thought the files had been doctored in some fashion and thought she detected Ledford's hand (albeit in printed form) where it normally would not be seen. Although uncertain of the situation, she nevertheless reported her observation to Watkins who, on November 1, came to Colorado Springs to conduct an investigation of the matter. After questioning everyone, including Ledford, as to whose handwriting it was, and after determining that recalculation of those hours made Ledford's efficiency appear better than it had been before, Watkins concluded that the individual who was likely to have doctored the forms was Ledford.

I note that the proof which Watkins had against Ledford is hardly conclusive. Nonetheless both he and Aldrich testified that this matter induced them to cite it as one of the reasons for discharging him. It should be observed that an unfair labor practice charge, Case 27-CA-6351, had been filed on September 12 alleging that Respondent's decision to transfer Ledford to Denver was unlawful. The record does not show when that charge was withdrawn, but it is conceivable that if Ledford were aware of the manner in which Respondent went about calculating employee efficiency, and was also aware that such material would be advanced by Respondent as a defense to an unfair labor practice charge, Ledford would understand the matter sufficiently well to realize that changing the underlying data would undermine that defense. Frankly, on this record neither fact has been sufficiently well proven for me to make any findings thereon. Nonetheless Gysin's testimony was not sufficiently shaken by the General Counsel or the Charging Party for me to discredit it; by the same token neither did Respondent clearly prove that Ledford doctored the documents, although he may have had both the motive and opportunity to do so.

The third reason listed in the discharge memo, "insubordination," involved Ledford's refusal to accept assignments as noted above and also included "threats" which are not truly denied by Ledford. These involve statements which he made to Koenig and Watkins to the effect that "heads will be broken." Ledford denies using that exact phraseology but admits he commonly uses the phrase "heads will roll" and concedes he may have used that statement to both those individuals. Respondent also points to a few occasions in which Ledford claimed he was compiling "dirt files" to be used against the Company in the event it carried out its demand that he move to Denver. Ledford denies making such threats but does say he was attempting to keep track of what happened to him in order to support the National Labor Relations Board's charges which had been filed. Finally, Watkins quotes Ledford, on November 1, as having "dared" Respondent to fire him, the challenge which is included in item three. Ledford denies having made that statement.

IV. ANALYSIS AND CONCLUSIONS

In the foregoing section explicating the facts leading up to Ledford's discharge on November 2, I have described those facts which may properly be construed as part of the General Counsel's case-in-chief, together with appropriate dovetailing facts proven by Respondent which should be juxtaposed against it. I have not described with detail the procedure which Respondent says it followed with respect to reaching its decision of August 27 to require Ledford to transfer to Denver. I have not done so beoause it is not a part of the General Counsel's burden of proof nor is it particularly necessary to discuss the procedure in detail as a response to the General Counsel's proof.

Of course in every case before the Board it is the General Counsel's burden to prove the alleged violation. Here, it is somewhat difficult to follow the General Counsel's alternative theories. First, the General Counsel alleges that Respondent's decision to transfer Ledford as either straightforward reprisal for the election results, for Ledford's own union sympathies, or because he participated in the representation case hearing. The difficulty with these theories is that the principal element of union animus is only ephemeral, if not missing altogether. With respect to the General Counsel's claim that the decision

to transfer Ledford violated Respondent's bargaining obligation to the Union, the theory is likewise unclear. Normally a unilateral change case can be made without a showing of animus. Here, however, the General Counsel has alleged that Respondent's purpose was to "undermine" the Union's majority status. These varying approaches to the facts, rather than strengthening the General Counsel's hand, demonstrate its weaknesses instead.

First, there is no particular showing by the General Counsel that Ledford's union activity was any greater than that of any other employee or that Respondent thought so or otherwise had reason to single out Ledford. Indeed, the initial contacts between the employees and management with respect to challenging the April 25 change in policy was made by a Denver employee, Steve Arneson. Haynes knew that. Ledford, though he may have spoken out at that meeting, has not been shown to be any more vocal or vociferous than anyone else. In any event the group's dissatisfaction with Haynes' response did not manifest itself to Haynes' perception as being aimed in a union direction. That direction did not materialize until after the meeting was over. Haynes has not been shown to have known who the union leaders were. Moreover, the General Counsel has not shown Ledford to have been such a leader.

Later, Ledford signed an authorization card, but so did others. And it is true that he participated in the Board hearing testifying to his status as an employee. In that sense Respondent may have deemed him to be in favor of union representation. However, Ledford himself appears to have neutralized that effect when both before and after the election he told Gysin, and others, first that he had not yet made up his mind, and, second, that he had voted against union representation. Thus even though he participated in the representation hearing, Respondent's management, who had been informed by Gysin that Ledford did not favor union representation, could not be sure of his stance. Thus, Respondent's state of knowledge regarding his union feelings and desires was not clear; Ledford sent them deliberately confusing signals. In that circumstance it does not seem likely that Respondent would have picked on Ledford as opposed to anybody else.

Respondent's alleged union animus, according to the General Counsel, can be seen from several angles. First the General Counsel points to the August 14 conversation between Ledford and Aldrich in which Aldrich, 4 days after the ballots were counted, allegedly told Ledford that the Union had brought Haynes and himself "to their knees." Ledford further testified that during that conversation Aldrich remarked that Respondent would not sign a contract with the Union. However, in the same conversation Ledford described Aldrich as having said Respondent would negotiate with the Union.

Ledford quoted Aldrich as saying Haynes "wouldn't have to sign an agreement. He just had to negotiate." In some respects the meaning of these remarks is unclear.[9] Certainly the National Labor Relations Act does not require Respondent to sign any proposal until an agreement is actually reached. Allowing for lay imprecision on Aldrich's part, such a statement contains no animus. If taken as an announced refusal to sign a negotiated agreement, such animus does not necessarily include an intention to discriminate against employees on a hire/tenure basis.

The second sentence—"he just had to negotiate"—likewise does not clearly evidence animus of a hire/tenure nature. Indeed, it can be understood as a recognition of the legal obligation to bargain with the Union, though conveying the likelihood of a hard bargaining stance. Even the statement that the Union had brought company officials "to their knees" is vague as animus evidence.

Aldrich himself says that he told Ledford Respondent was obligated to bargain in good faith and that the outcome of the negotiations could be any number of variables. In a sense, therefore, Ledford's statement that Respondent just had to bargain can be seen as a corroboration of Aldrich's denial. Frankly, if any animus has been shown here, it is more closely related to bargaining positions to be taken shortly, not reprisals against employees.

Other areas of alleged animus can be found, according to the General Counsel, in campaign literature and, apparently, by the fact that Respondent did not participate in the representation case hearing. With respect to the literature, the General Counsel's Exhibit 15, there is no animus whatsoever. Regarding Respondent's failure to participate in the representation case hearing, that failure is adequately explained by the fact that it conflicted with a trade show in which Respondent no doubt had invested a great deal of money. It did seek a continuance, but to no avail. To derive animus from that circumstance would be inappropriate. Also cited as evidence of animus is Ledford's claim that he and Edde were "ignored" after the election. However, the evidence does not show that, and even if it did, it would not amount to animus.[10]

Also mitigating against a conclusion that Respondent had union animus manifesting itself in ordering Ledford's transfer is the manner of the transfer itself. First, Aldrich gave Ledford more than 90 days in which to make the transfer. Respondent had transferred him to Colorado Springs in the first place and considered itself to have the power to transfer him back. In both instances its policy was to cover relocation costs. It was not a transfer designed to force Ledford to quit as it would have been had union animus been the motivating force. It was designed to make it palatable. Second, when Ledford refused the October 22 assignment, it did not act precipitously. It warned him. But Ledford's failure to heed the warning did not even result in his discharge, only a week's suspension. Respondent then tolerated his appar-

[9] Aldrich may have been alluding to the Union's area agreement covering other employers as the expected proposal. Haynes had earlier referred to it in compaign literature dated May 18.

[10] Also in the category of nonconclusive evidence is an unsent letter to Ledford, drafted by counsel for Aldrich's signature, Resp. Exh. 6. That letter was to have served as a warning to Ledford regarding some threats he allegedly had made in October and during the suspension process on October 23. The letter does connect the threats to Ledford's Board charge, but the threats are not clearly described. In any event, the letter was never sent, because, according to Haynes, Ledford had already been suspended, and that was deemed warning enough.

ent balk of November 1, though it was suspicious of Ledford's veracity. Respondent clearly did not wish to lose Ledford as an employee. That being the case it is hard to see what Ledford's union sympathies or the majority's selection of the Union had to do with the transfer. The Union had won and had been certified. And, although bargaining had not yet commenced, Ledford's transfer could have had little, if any, impact on it. As Respondent could gain nothing by way of its future relationship with the Union by transferring Ledford, I fail to see any animus here.

The third element in any discharge case is that of timing. Timing, here, is double-edged. It is true that the decision to transfer Ledford was made only a week after the certification became final and 17 days after the election results were known. But that decision also closely followed a favorable periodic evaluation given Ledford on August 6. Because the evaluation and the retroactive raise that went with it coincided with the last campaign speech before the ballots were mailed and because Aldrich did not wish to be accused of improperly influencing Ledford's vote, he gave it to Ledford in a sealed envelope, offering to have it held by a third person pending the election.

General Counsel does not allege this to have been improper. Furthermore this evaluation is consistent with evaluations given Ledford previously and clearly marked him, if he had not already been so marked, as one of Respondent's best and most qualified service engineers.

That fact ultimately was the reason that Respondent selected him over Edde as the individual to be transferred to Denver. Clearly Denver is a larger market for air-conditioning and heating equipment than Colorado Springs and clearly there would be greater need for an individual of Ledford's skills as opposed to those of Edde's, whose experience was only slightly more than a year in the field. Thus, while it may be argued that the timing of the decision is close to the election results, the manner of selection tends to show that the election had nothing whatsoever to do with the decision. Eespondent was most careful, and took great pains, to avoid being accused of misconduct with respect to Ledford's evaluation. Second, the market situation in Denver required someone of greater skill.[11]

I am, therefore, unable to find that the General Counsel has made out a *prima facie* case that Respondent discriminated against Ledford either because he was a union activist or because it sought to take a reprisal against the union-represented employees generally. Certainly there is no evidence to show that Ledford's participation in the representation case hearing had anything to do with the decision.[12]

With respect to the 8(a)(5) allegation, once again the proof nears nonexistence. The General Counsel relies on Ledford's testimony that he had an agreement with Respondent to the effect that Edde, not he, would be transferred to Denver should economic circumstances require it. First of all, there is no reason to credit Ledford's testimony to that effect.[13] But, assuming that his testimony is credited, the agreement was a private one between him and Respondent. It was not a term and condition of employment for employees generally. He had negotiated it long before the union organizing drive and it related to him specially, to no one else. Thus, assuming Respondent reneged on that agreement, that act affected only him, not the terms and conditions of the other employees in the bargaining unit. It was not, therefore, a change in working conditions as contemplated by Section 8(a)(5) and 8(d). See *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701 at 704 (1974), and *Brown & Connelly, Inc.*, 237 NLRB 271 at 280 (1978). Cf. *Orfont Orthodontic Laboratories, Inc.*, 156 NLRB 49 at 64–66.

And, as with the 8(a)(3) and (4) allegations, *supra*, the General Counsel's claim that the unilateral change was designed to undermine the Union's majority status depends on a showing of union animus. Here, as there, the evidence is nonexistent. There is no proof whatsoever that Respondent intended to undermine the Union's majority status or that Ledford's transfer would have that forseeable effect. Furthermore, the transfer contemplated Ledford's continued employment in the bargaining unit. Thus, the "undermining the Union" theory also fails for lack of proof.

Accordingly, I have concluded that Respondent did not violate Section 8(a)(1), (3), (4), or (5) of the Act here and I shall recommend dismissal of the entire complaint.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Haynes-Trane Service Agency, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 208, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any violations of Section 8(a)(1), (3), (4), or (5) of the Act.

[11] In this respect it should be noted that Respondent has been attempting to recruit experienced service engineers to work in its Denver office for some time. It had also recently experienced a loss of three such employees and had only been able to locate one new individual.

[12] Had Respondent truly wished to take a reprisal against Ledford for testifying in the representation case hearing, it could have done so as he had provided them with ready reason, his failure to note his whereabouts on his June 12 timesheet. That failure did trigger an inquiry by Aldrich, but he let it drop.

[13] With respect to Ledford's credibility generally, I found him to be glib and capable of explaining all questions in an innocent-appearing manner. His testimony must be carefully examined. For example, his denial that he "dared" Respondent to fire him on November 1 cannot be credited. He was already prepared to begin his new business. He had committed time and money to that effort. Once he had made up his mind that he was not going to Denver and had prepared for the worst, his "dare" becomes quite likely. His frustration level was then quite high and his dare, in light of his newly seen independence, is more than a mere possibility. Thus, where credibility matters, I cannot credit Ledford over others. Certainly the General Counsel has provided no reason to discredit Respondent's witnesses when compared to Ledford.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The complaint is dismissed in its entirety.

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.